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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1492

BERNARD GUTTMAN t/a
LIBERTY NURSING CENTER,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
and
PROFESSIONAL HEALTH CARE DIVISION,
RETAIL CLERKS LOCAL 1361,
CHARTERED BY RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondents.

BRIEF OF RESPONDENT LOCAL 1361 IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 78-1571

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Question Presented

Whether Employer who failed to make a convincing offer of proof sufficient to obtain an evidentiary hearing from the National Labor Relations Board or the United States Court of

Appeals for the Third Circuit should now obtain an evidentiary hearing by Order of the United States Supreme Court without adducing any new facts or allegations.

Statement of the Case

Pursuant to Rule 40(3) Respondent Local 1361 makes no separate statement of the case and would make the following corrections and additions to Petitioner's statement:

1. The Regional Director found that after voting, two employees held brief conversations with other employees waiting to vote. Petitioner states that the Regional Director "failed to address the question as to why neither employee was a 'representative' of the Union at the time the statements were made" (Pet.p.5). However, this issue was addressed by the Regional Director who found that ". . .the investigation disclosed no evidence that either of these employees had any authority to act on behalf of the Petitioner" (App.D, p.39). In addition, the Regional Director cited *Owens Corning Fiberglass Corp.*, 179 NLRB 219 (1969) in support of his finding that "Although it appears that one of these employees may have engaged in some activity in support of the Union's campaign, it is well established that the mere fact that employees are prominent in the Union's campaign is not sufficient to establish that they are agents of the Union" (App.D, pp.39-40; footnote omitted).

2. Petitioner recognizes that "The Courts of Appeals have held that in order to require a hearing in a post-election representation proceeding, the objecting party must supply evidence sufficient to make a *prima facie* showing as to facts which, if true, would require the holding of a new election" (Pet.p.9). In addition, 29 C.F.R. § 102.69(g) provides in pertinent part:

> . . .in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for a review of a regional director's decision on objections or challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director *and which were not included in the report or decision*. (Emphasis added).

Although Petitioner filed timely exceptions to the Regional Director's report together with a supporting brief, it did not file supporting affidavits or other documentary evidence with the Board (App.B, p. 24).

In its Brief in Support of its Petition to the Third Circuit for Review of the Decision and Order of the National Labor Relations Board (App.B) Petitioner supported its factual assertions by appending as "Exhibit A" one affidavit of its employee Kathryn Krause.

ARGUMENT

I. The decision below that Petitioner failed to raise substantial and material factual issues sufficient to warrant an evidentiary hearing does not raise any significant issues of importance to litigants other than those in the present case.

Petitioner claims that an evidentiary hearing should have been held regarding its objections to an election won by the Union.

The standard for review by this Court is well settled. As this Court said in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-1 (1951):

> Our power to review the correctness of application of the present standard ought seldom to be called into action.

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. *This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.* (Emphasis added)

The test applied by the Courts of Appeals as to whether on the record as a whole there is substantial evidence to support agency findings applies to all types of Board cases including representation cases. *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 407 (1962). The Regulations of the National Labor Relations Board commit the decision as to whether an evidentiary hearing is required in the first instance to the reasonable discretion of the Regional Director. Thus 29 C.F.R. 102.69(d) provides:

> The action of the regional director in issuing a report on objections or challenged ballots, or both, following proceedings under § 102.62(b) or § 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under § 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in paragraphs (c) and (f) of this section; if the regional director issues a decision, the parties shall have the rights set forth in § 102.67 to the extent consistent herewith.

Secondly, upon the filing of exceptions to the Regional Director's Report on the Election, the National Labor Relations Board decides whether the exceptions raise substantial and material issues sufficient to warrant a hearing.

Thus 29 C.F.R. 102.69(f) provides in pertinent part:

> In a case involving a consent election held pursuant to § 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer.

Finally, review of the Board's decision can be had in the United States Courts of Appeals. The Courts of Appeals place the burden of proof on the party seeking a hearing. The very cases cited by Petitioner support this. Petitioner's Appendix G presents *Prestolite Wire Div. v. N.L.R.B.*, ... F.2d ...., 100 LRRM 2503 (6th Cir.1979) in which the Sixth Circuit reiterated its standard in *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172, 178 (1967) (App.G, pp.62-63):

> It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. . . Mere disagreement with the Regional Director's reasoning and conclusions do [sic] not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing. To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support

findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof. (Citations omitted.)

The Third Circuit similarly has stated:

> Judicial decisions have clearly established that the courts will review Board orders based on the disposition of challenges to crucial ballots without an evidentiary hearing to ensure that they are consistent with these rules. The parties are entitled to such a hearing if substantial and material factual issues are raised and if the Board has clearly erred in denying a hearing its order will not be enforced. It is equally clear, however, that such *a hearing will not be required if no such issues existed, either because the regional director and the Board have assumed the truth of the factual offer of the objecting party or because they have reasonably concluded that the facts alleged would not constitute legal justification for setting the election aside.*

N.L.R.B. v. Sun Drug Co., 359 F.2d 408, 414 (3d Cir.1966) (Citations omitted; emphasis added). *See also N.L.R.B. v. El-Ge Potato Chip Co.*, 427 F.2d 903, 906 (3d Cir.1970).

Petitioner urges the Court to apply the reasoning, philosophy and judicial precedent applicable to summary judgment criteria under F.R.C.P. Rule 56 to the administrative procedures of the Board (Pet.p.10). It is totally inappropriate to apply the precedents for summary judgment under F.R.C.P. Rule 56 to the administrative proceedings here. As the Third Circuit has said:

> A recognition of practical necessity underlies these rules. Time is a critical element in election cases. This factor explains the refusal of Congress to provide for judicial review of representation disputes until they result in an unfair labor practice order. See *Boire v. Greyhound Corporation*, 376 U.S. 473, 476-77, 479, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964); *N.L.R.B. v. Air Control Products*, 335 F.2d 245, 251-52 (5th Cir.1964); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 56057 (1947), U.S. Code Congressional Service 1947, p. 1135. It is no doubt largely for the same reason that the statute does not require a hearing and that the Board's Rules and Regulations authorize an administrative investigation unless "substantial and material factual issues exist which can be resolved only after a hearing." Where there are no such issues, the decision of challenged ballots on the basis of an administrative investigation is "not only proper but necessary to prevent dilatory tactics by employers or unions disappointed in the election returns * * *." *N.L.R.B. v. Joclin Mfg. Co.*, 314 F.2d 627, 632 (2d Cir.1963).

N.L.R.B. v. Sun Drug, 359 F.2d at 414, footnote omitted.

Petitioner has had three opportunities to submit affidavits and other evidence to demonstrate the need for an evidentiary hearing. Petitioner has failed to convince the Regional Director, the National Labor Relations Board and the United States Court of Appeals for the Third Circuit that its objections raised substantial and material issues sufficient to warrant an evidentiary hearing. Petitioner has not now presented any new factual allegations nor made any other offer of proof showing that factual disputes exist which, if decided in Petitioner's favor, would change the outcome of the Board's decision.

The decision as to whether substantial and material factual issues exist is a decision well within the competence of administrative agencies and the Courts of Appeals. This is the type of judgment the Board and the Third Circuit are traditionally and constantly called upon to make. No guidance in logical thinking or explicit criteria need be handed down by the Court in order that this sort of decision be properly made as Petitioner alleges (Pet.p.10). It is impossible to propound decision criteria which will anticipate all future fact situations. Courts will always have to wrestle with the application of well settled legal principles to varying sets of facts.

II. The decisions below not to hold an evidentiary hearing were correct because the Regional Director found that even if the Petitioner's evidence and factual allegations were credited the election should not be set aside.

Petitioner seeks to have this case reviewed because he maintains an evidentiary hearing should have been held. As Petitioner states, "The Courts of Appeals have held that in order to require a hearing in a post-election representation proceeding, the objecting party must supply evidence sufficient to make a *prima facie* showing as to facts which, if true would require the holding of a new election" (Pet.p.9).

> The exceptions [to the Regional Director's Report] must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. . . . Mere disagreement with the Regional Director's reasoning and conclusions do [sic] not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing.

N.L.R.B. v. Tennessee Packers, Inc., 379 F.2d 172, 178 (6th Cir.) *cert. denied*, 380 U.S. 958 (1967) (App. G, p.62).

We submit that all Petitioner's objections are conclusions of law and that Petitioner has not offered evidence sufficient to make a *prima facie* showing as to facts which, if true, would require the holding of a new election. The Third Circuit has neither misapprehended nor misapplied the "substantial and material issues" test and therefore no review by the Court is warranted.

Petitioner repeats before this Court three of the four objections raised unsuccessfully below. In each instance the

Regional Director reasoned that even accepting the facts alleged and the evidence offered by Petitioner as true, the election should not be set aside.

First, Petitioner alleged below that two employees who were supporters of the Union engaged in conversation in the polling area with employees waiting to vote (Pet. pp.11-12). The Regional Director found that no evidence was presented as to the content of these conversations and no evidence was presented which demonstrated that these employees had any authority to act on behalf of the Union (App. D, p. 39). Thus even accepting that the conversations occurred, and that one of the conversations may have involved electioneering, the Regional Director found that these facts were not sufficient to set aside the election because the Petitioner did not produce evidence sufficient to show that either of the employees were agents of the Union (App. D, pp.39-40). No offer of proof was ever made by Petitioner which would show this. For these reasons there was substantial evidence to support the Board's findings and the Third Circuit was correct in affirming the Board's finding that Petitioner had not made a sufficient offer of proof to warrant granting an evidentiary hearing.

Second, Petitioner alleged that employees and representatives of the Union threatened five employees with loss of their jobs if they did not support the Union. The Regional Director did not contest the factual assertions, but found that even accepting them no facts were adduced sufficient to set aside the election. Thus, with regard to the first two employees the Regional Director found that the statements alleged to have been made to them ". . .could not reasonably be construed to coerce employees in the exercise of their free choice in the election" (App. D, p.42). There was no evidence to establish that the Union was responsible for the threatening telephone calls to the third employee and

Petitioner did not offer in its exceptions any additional evidence which, if credited, would establish this. With respect to the remaining two employees the Regional Director again found that "Even assuming. . .that the employees are to be credited, the statements made are not sufficient to warrant setting aside the election" (App.D, pp.42-43). For these reasons Petitioner failed to make a *prima facie* showing that substantial and material factual issues existed sufficient to warrant an evidentiary hearing.

Petitioner cites *Seamprufe, Inc.*, 82 NLRB 892 (1949) and *N.L.R.B. v. Southern Paper Box Co.*, 473 F.2d 208 (8th Cir. 1973) as instances in which either the Board or a Court of Appeals did order a hearing. These cases do not evidence any inconsistency with the present case. The Board or the Court of Appeals found that in *those* cases the petitioner had met the burden. In *this* case, applying the same test, and based on the offer of proof in Petitioner's exceptions and in its brief before the Court of Appeals, the National Labor Relations Board and the United States Court of Appeals for the Third Circuit decided that this Petitioner had failed to raise substantial and material issues of fact sufficient to warrant that an evidentiary hearing be held.

Third, Petitioner alleged that the Union made certain misrepresentations concerning its financial condition. Again, however, no resolution of contested facts was necessary because the Regional Director found that ". . .even if the Union had made the misrepresentations attributed to it by the Employer, the statements would not warrant setting aside the election" (App. D, p.44).

In support of its position Petitioner refers to the *Hollywood Ceramics* rule under which the Board would set aside an elec-

tion ". . .where there has been a misrepresentation or other similar campaign trickery, which involved a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation. . .may reasonably be expected to have a significant impact on the election." *Hollywood Ceramics Co.*, 140 NLRB 221, 224 (1962) (Pet. p.15).

The alleged misrepresentations occurred about one week before the election in the present case which was held on June 10, 1977 (App. D, pp.37-43). Two months earlier the Board repudiated the *Hollywood Ceramics* rule and in *Shopping Kart Food Market, Inc.*, 228 NLRB No. 190 (1977), 94 LRRM 1705, decided on April 8, 1977, announced it was returning to its pre-*Hollywood Ceramics* rule. Under the *Shopping Kart* rule the Board stated that it would ". . .no longer set aside elections on the basis of misleading campaign statements [except]. . .where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is." 228 NLRB No. 190, 94 LRRM 1705, 1708 (1977).

The events in this case fall under the *Shopping Kart* rule and there is thus no possibility of setting aside the election even if the misrepresentations Petitioner has alleged are proved. There are no allegations in this case that the Union improperly involved the Board's processes or that forged documents were used. Thus an evidentiary hearing is totally unnecessary as to this objection and would not enable

Petitioner to prove facts which, if established, would be grounds for setting aside the election.[1]

Petitioner cites three cases in which Courts of Appeals found that allegations of misrepresentations presented therein raised substantial and material factual issues sufficient to warrant an evidentiary hearing: *N.L.R.B. v. Southern Paper Box Co.*, 473 F.2d 208 (8th Cir.1973); *Alson Mfg. Aerospace Division of Alson Industries, Inc. v. N.L.R.B.*, 523 F.2d 470 (9th Cir.1975); *Prestolite Wire Div. v. N.L.R.B.*, ... F.2d ...., 100 LRRM 2503 (6th Cir.1979) reprinted in Appendix G, pp.54-70). The *Southern Paper Box* election was held on April 9, 1971, 473 F.2d at 209; the *Alson* election was held on June 28, 1973, 523 F.2d at 471; the *Prestolite* election was held on July 3, 1975, App. G, p.55. All three elections came under the *Hollywood Ceramics* rule. These cases are therefore all inapposite because while misrepresentations are a basis for setting aside an election under *Hollywood Ceramics*, the misrepresentations alleged by Petitioner here are *not* a basis for setting aside an election under *Shopping Kart* which was the applicable rule in this case.

For all these reasons, there was substantial evidence considering the record as a whole to support the findings of the Board and the Third Circuit correctly decided that Petitioner

[1] On December 6, 1978, the Board announced it was returning to the *Hollywood Ceramics* rule in *General Knit of California*, 239 NLRB No. 101, 99 LRRM 1687. Of course, a change in the rule after the events in question in this case is not controlling. Moreover, the Regional Director found that even if the Union had made the misrepresentations attributed to it by the Employer, the statements were not material misrepresentations which would warrant setting aside the election under the *Shopping Kart* rule or under the *Hollywood Ceramics* rule (App. D, p.44). Thus it is clear that, at least as to this objection "the Board. . . assumed the truth of the factual offer of the objecting party [and has] . . . reasonably concluded that the facts alleged would not constitute legal justification for setting the election aside." *N.L.R.B. v. Sun Drug Co.*, 359 F.2d 408, 414 (3d Cir.1966).

had failed to make a sufficient offer of proof to warrant ordering an evidentiary hearing.

III. No conflict between the Circuits is raised where the Courts have applied the same standards to different factual circumstances.

Petitioner does not allege that the standard followed by the Third Circuit conflicts with that followed by the other Circuits. Rather Petitioner's claim appears to be that the Courts of Appeals arrive at different decisions under apparently similar factual circumstances.

It has been argued above that the cases cited by Petitioner while superficially similar, are all different in important crucial respects. It has also been argued above that the type of decision involved here, namely, whether Petitioner raised substantial and material factual issues which, if credited, would result in setting aside the election, are the type of judgment the Board and the Courts of Appeals are constantly called upon to make and are well within the competence of these bodies. It is impossible to arrive at a set of decision criteria which would instruct the Board and the Courts how to decide all possible cases. Finally, this Court has stated it will only review decisions in the Courts of Appeals in those rare instances when the standard appears to have been misapprehended or grossly misapplied. It has been argued above that the Third Circuit and the Board have correctly applied the applicable standards and that there is therefore no occasion for this Court to intervene.

Conclusion

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way which conflicts with the decisions of other Courts of Appeals or of this Court on the same matter. The Court of Appeals correctly applied the applicable standard of review and the findings of the Regional Director and the National Labor Relations Board are supported by substantial evidence considering the record on the whole.

Respectfully submitted,

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